No. 12999.

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

E. Toor,

Appellant,

vs.

. Westover,

Appellee,

E. Toor and Florence D. Toor,

Appellants,

vs.

. Westover,

Appellee,

APPELLANTS' REPLY BRIEF.

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TOPICAL INDEX.

CASES

STATUTES

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I.

The Facts.

tement of facts as presented in the Brief for the s, in substance, a mere repetition of the findings rial Court. The findings made by the Trial ich are particularly material to the matters in- this appeal, are without support in the evidence ontrary to the uncontroverted established facts

and a sham transfer, is utterly without support
trary to all of the evidence in this case. Th
troverted facts show: (1) gifts of cash funds
band and wife (the taxpayers) to a national ban
tee; (2) the actual ownership by the bank as
the cash funds thus received for the future
taxpayer's children (no payments to be made
until termination of the trusts which expire
children attain their respective ages of major
the organization of a limited partnership to
furniture manufacturing business; (4) the ban
a limited partner pursuant to clear and unequiv
ten partnership agreements, pursuant to which
acquired an ownership interest to the extent of
ownership for each of the two trusts; (5) the
did not in any manner own or benefit by the port
partnership owned by the bank; (6) the contr
cash to the partnership by the bank was in pro
the total capital of the partnership and the
rights of the parties to participate in profits; (
the taxpayers (Mr. Toor) became the general pa
received reasonable compensation for all services
to the partnership; (8) the bank as trustee
capital contributed by it to the partnership, a
quently owned the partnership interest from wh
accrued; (9) although the taxpayers originally
furniture manufacturing business, the same w

in accordance with the partnership agreements. of the parties complied with the terms of the ip agreement: (11) Mr. Toor exercised the of a general partner and these were each and sed for partnership purposes only; (12) the consulted and advised with Mr. Toor; (13) ere allocated in accordance with ownership of ctive partnership interests, all assets of the part- vere used only for partnership purposes; (14) crued to the trusts and there was no manner by taxpayer could deprive the trustee of the same; partnership was organized in 1942, when the the wood furniture manufacturing business in California was highly speculative; however, this iness, due to subsequent general wartime con- xperienced a windfall of large profits; (16) ie first few years of the partnership only ap- ely 40% of the profits were distributed and the as retained to meet the needs of rapidly expand- ne; (17) by reason of their ownership of the ip interest the trusts actually received their the profits; the Government assessed the tax- r income which taxpayers did not own, did not nd could not receive or benefit from.

he exception of matters pertaining to the ir- nature of the trusts (to which reference will

II.

The Ownership of the Assets Which Yielde come Was a True Ownership.

The capital contributed to the partnership was the trustee, the partnership interest acquired ment was likewise owned by the trustee, and nership agreement was clear and unequivocal. of these facts the Trial Court concluded that " tiff did not form and carry on as a partnership meaning of the Internal Revenue Code during a taxable years involved in this case, the furnitu facturing business known as The Furniture Guil fornia." In effect the Trial Court said that t a partnership "for income tax purposes."

As stated in the concurring opinion in *Barret missioner* (1st Circuit, 1950), 185 F. 2d 150, 1

> "In cases of this sort, involving taxati come of family partnerships, a great deal able confusion has been engendered by t (which obtained some currency) that an a which for general purposes would be deem nership under the usual common law test necessarily be recognized as a partnershi come tax purposes.' Thus was introduced a concept; and the need arose to give som definition of the special elements constitutin nership for income tax purposes,' where ported partnership is between members o mate family group. So far as I can see, t was utterly devoid of statutory basis, as is

d. 1659, the effect of that case is to sweep this
er notion into the discard. This is more sharply
ed up, perhaps, in the concurring opinion by Mr.
ce Frankfurter. But the same viewpoint is dis-
ble from a reading of the majority opinion as a
e."

ry way in this case the evidence demonstrates.
t of the income of the business, but an actual
roperty and the passing of title thereto, which
produced the income in question. The one-
nership of the partnership belonged to each of
s and the only way the taxpayers could get it
to buy it back the same as if owned by a
The bank, acting as a trustee, was a stranger,
nt and free acting, and not in any respect sub-
ie control of the taxpayer. Under the state of
ice in this case the Trial Court could not conclude
lealings between the taxpayer and the bank, and
gs between the bank and the partnership, were
ubterfuge, or concealment for the purpose of de-
[R. 137-160, 338-396, 439-443, 169-172.]

port the assertion that the ownership of the
terests in the partnership was a mere sham or a
llocation of income, would require a determina-
the taxpayer and the bank stood ready to violate
ership agreement and their fiduciary obligations
ne. At the time of trial the Trial Court recog-
t the evidence was all directly to the contrary.

ership should be disregarded for tax purposes bec
Toor, as the general partner in this limited par
had the management and control of the entire
(Resp. Br. p. 12.) This is a reiteration of th
tion set forth in Finding 24, wherein the Tri
ruled that because of Mr. Toor's control and "ret
so many attributes of ownership of the trust
his business" he must be charged with the frui
capital he did not own. These "attributes of ow
in this case consist of nothing more than this nor
trol Mr. Toor had as a general partner for the
ship purposes of a limited partnership.

The Trial Court disregards the question a
amount of income produced by capital of the
when in fact such capital was a major income p
factor, and the Trial Court further disregards
that Mr. Toor received a separate and reasona
pensation for all of his services and abliities, w
charged as an expense of operation and deducted
the computation of profits of the partnership.
payer having been fully compensated for everyt
he as an individual contributed to the partners
ness, the principal issue in this case is concerned
remaining income produced by the capital of the
ship, which should be taxed to the owners of t
nership, in accordance with the decision in *Luca*
281 U. S. 111, 50 S. Ct. 241. In spite of the fact
sixth of this partnership and its capital was actua
by each of the two trusts, the Court has determ
for tax purposes Mr. Toor should be regarde

er words, the Government is frankly contending
p. Br. p. 24, p. 19, footnote 6), and the Trial
as in effect ruled, that the normal management
rol of a general partner in a limited partnership
cient attribute of ownership to convert an other-
l partnership into an invalid one for tax purposes
e limited partners are members of the family and
e donated capital.

ontention is contrary to the principles enunciated
Tower and *Culbertson* cases. (See particularly
ence in the *Culbertson* case at 337 U. S. 744, 69
15.) In the words of the *Culbertson* case, such a
dicates at best an error in emphasis . . . and
cisive what was described as 'circumstances [to
into consideration" in making the determination
ether the partnership is real. See also, *Miller v.*
ioner (6th Cir. 1950), 183 F. 2d 246, 254; *Cobb*
issioner (6th Cir. 1950), 185 F. 2d 255, 258.
cases applying the principles of the *Culbertson*
ruled against this contention of the Government
ger v. Commissioner (7th Cir. 1949), 177 F. 2d
nb v. Smith (3rd Cir. 1950), 183 F. 2d 938.

ue that the concurring opinion in the *Tower* case
the position presently urged by the Government,
a family limited partnership, formed with capi-
ted by the general partner, is not to be recog-
tax purposes. However, as specifically pointed
r. Justice Frankfurter in his concurring opinion
lbertson case (337 U. S. 750, 69 S. Ct. 1218),
wer opinion did not say what the Government

It is true that Mr. Toor in the exercise of h
as the general partner in a limited partnership
trol of the partnership business for partnership
Inherent in the nature of a limited partnersh
fact that the limited partners are inactive and
general partner is the active controlling participa
conduct of the partnership affairs. As stated in
curring opinion in *Barrett v. Commissioner,*
p. 154:

> "Not infrequently one or more *bona fide*
> may be inactive or dormant, this factor be
> pensated by the payment of salaries to t
> partners. So here, the partnership agreem
> vided that the partners 'shall be paid such s
> may be agreed upon, to be charged as an ex
> the business.' Such an arrangement, so far
> see, involves no problem of *Lucas v. Earl,*
> U. S. 111, 74 L. Ed. 731. If the partnersh
> ment provides that the dormant partner is
> one quarter of the net profits, such share o
> income, whether distributed or not, is taxab
> dormant partner under I. R. C. sec. 182.
> taxable to the active partners on the theory
> 'earned' it."

In any event, the Trial Court ignored the c
between the control of an owner of a business a
only to himself, and the control of a general par
a business owned only in part by himself. Th
partner is limited by his fiduciary obligations, a
wise limited by the provisons of his contract and
tations prescribed by law.

no "business purpose" in the formation of the
p. In this respect the Government contends
erm "business purpose" as used in the *Culbert-*
oes not exist unless there is a benefit to the busi-
p. Br. pp. 20-22). The Governments contention
spect is directly contrary to the substance of the
n opinion and would make one factor, to wit,
ce of a benefit to the business, conclusive. The
e not adopted the requirement that there be a
the business in order for the partnership to be
l. See *Miller v. Commissioner,* (6th Cir. 1950)
246, 254, which holds directly contrary to the
nt's contention. The *Culbertson* case states
S. 744, 69 S. Ct. 1215):

f upon a consideration of all of the facts, it is
l that the partners joined together in good faith
nduct a business, having agreed that the services
pital to be contributed presently by each is of
value to the partnership that the contributor
d participate in the distribution of profits, *that*
fficient." (Emphasis added.)

bmitted that what is meant by the phrase "busi-
ose" in the *Culbertson* opinion is simply a true
oin together for the purpose of carrying on the
rather than a *mariage de convenance.* See *Bar-*
mmissioner, supra, at page 151. *Cf. Slifka v.*
oner (2d Cir. 1950), 182 F. 2d 345, 346.

esent case is entirely distinguishable and unlike
f *Giffen v. Commissioner,* 190 F. 2d 188, de-

upon which to rest a valid partnership with the
In the instant cause the gifts in trust and the pa
arrangement were a part of a plan resulting fro
tic difficulties between Mr. and Mrs. Toor. It
time after the taxpayers determined a course o
with respect to their assets and provision for t
dren that the tax consequences were examined.
99, 103-105, 296-298, 309-310, 318-322, 327-

As stated in *Barrett v. Commissioner, supra,* at

> "There is nothing in the law of federal in
> ation forbidding members of an intimat
> group who wish to go into business togethe
> a partnership because that form of busines
> zation is advantageous to them from the tax
> view."

The Government is clearly in error in asserting
Toor had complete and exclusive power of alloc
disposition of the income from the business. (
pp. 18, 19.) The provision vesting in the genera
the discretion as to when to distribute profits was
function of management, and in view of the
capital requirements of this business and the
which it was operating, a very necessary provis
course, Mr. Toor could not make distribution t
without making proportionate distribution to th
partners, and could not derive any personal ben

ly to all the partners. In this connection we Trial Court's observation during the trial [R. this very element indicated that the partner- *not* a paper organization.

overnment also observes that Mr. Toor was em- o terminate the partnership by appropriate notice t the limited partners (Resp. Br. p. 18). How- Toor could not in any way deprive the trusts of ership of their proportionate shares of the busi- of their accrued income; in order to acquire rests he would have had to pay full book value [R. 37-38]. Furthermore, the testimony dis- t the provision had a valid business reason [R. and in addition, was a perfectly normal pro- a limited partnership. Of course, if Mr. Toor nased the interest of the partners, they could rwise invested these same funds in accordance rust agreement.

overnment contends that the limited partners exercise their rights as such. The evidence radicted that the bank did use independent ; that Mr. Toor kept the bank informed of uct of the business, and consulted with the ers from time to time; that the bank received l accountings and did consider the same, and felt that the bank met with Mr. Toor for the pur-

national bank. No instance has ever been sugges
what other advice the bank could or should have
any time. It is true that the bank did not feel ca
to assert its rights by legal process, because it v
fied that the business was properly conducted an
was receiving everything to which it was entitled

In the face of this uncontradicted testimony
dence in this case, the Court made its findings nu
and 23, clearly holding and finding that at no tim
no instance did the bank use independent judg
suggest any action or exercise any of its rights
way of advice, and that the bank did not exercis
ion or control over the trust *corpus* in the busi
did not influence the conduct of the partnershi
disposition of its income. In view of this misc
by the Court it is evident that only an improper
has resulted.

The Government urges that there was no trust
pleted gift because the trusts and the partnersh
completed as "one package." We note that th
was empowered to invest in securities of the
States and of the states and instrumentalities
as well as in businesses in which Mr. Toor par
as a principal, and that they actually did so invest
event the mere fact that the trusts and partners
concluded at the same time would not invalidate
or render the same incomplete. In so far as ou
inquiry is concerned, the same result would h
achieved if the taxpayers had given to the trust

vas effectuated, the gift was complete and the me the actual owners of their respective part- terests. A man may give to his children di- rt of the real property he owns or part of the stock of a business in which he is principal , or he may give them the money with which e such assets; in either event, the children as e taxable with the income therefrom. See *Commissioner* (6th Cir. 1937), 90 F. 2d 323; *Commissioner,* (1941), 45 B. T. A. 855.

al matter, the Government contends that in any Trial Court looked at all the circumstances in with the *Culbertson* opinion and found as a a lack of intent to form a valid partnership. ore that its findings are conclusive. However, en demonstrated, this conclusion is based upon dings which have no support in the evidence, upon the part of the Trial Court to consider erial facts and represents an improper applica- principles of law enunciated in the *Culbertson* is respectfully submitted that an inference of ontrary to all of the evidentiary facts may not by the Trial Court at will and without chal-

n of the Court is also respectfully invited to the which contains the relevant portions of the Rev- of 1951 recently adopted, and the pertinent sec- ne hearings of the Senate Finance Committee hich deal specifically with many of the issues

III.

The Argument With Respect to the Date of bility of the Trusts.

The argument for the Government with resp irrevocability of the trusts pointedly ignores th tion brought out by Appellants between the in clerical or typing error of the instant case, and presented in *Gaylord v. Commissioner* (9th Cir. 1 F. 2d 408, where the document was in the form payer intended but where he erred in interp legal effect. The Government contents itself portion of the argument with simply pointing ou trust documents, as originally executed, did no a provision making them irrevocable; that un fornia law they were therefore revocable and ruling of the Trial Court that the instruments taken as written, is obviously correct. (Resp. B 31.)

If the parties had signed the trust document, it to be irrevocable but failed to include an irre clause either because they thought it was not or because they did not think about it at all, have a situation similar to that presented in th case. However, here the parties had seen, revi discussed the drafts of the documents containi revocability clause but by the time they came t the irrevocability clause had been inadvertentl from the final draft by a typing error; they believing the document they signed to be a tru the draft they had seen, including the clause in

dated December 14, 1943 confirming what the ıtention was, the Trial Court should have ac- ognition to the nature of the error, and read ents as if the irrevocability clause had been con- rein. This would have followed the dictates of of the Civil Code of California which provides e through mistake or accident a written contract press the real intention of the parties, such in- to be regarded. By properly construing the in- in accordance with Sec. 1640, the Court would been reforming the instruments nor converting into one for reformation.

ial Court in this case was called upon to rule issue just is it was called upon to rule and did ıgh incorrectly) as to whether or not the in- was executed on the date it bore or on some e. The Trial Court erred in stating that for ses it was compelled to take the instrument as nd further erred in avoiding a decision on this he premises that this was not an action for ref-

e, that the *Gaylord* ruling is based, at least in ıe rule that parole evidence was inadmissible to lain terms of the instrument therein questioned. in the instant case, the type of error we have imperfection in the writing—has specifically e an exception to the parole evidence rule.

California Code of Civil Procedure, Sec. 1856; *il Code*, Sec. 1640.

Trust. This is so for the same reason as abov
to—the type of error corrected was an imperfect
writing, and the original instruments were n
stored to the condition the parties thought the
when they signed them.

In the *Gaylord* case, the taxpayer, having s
document that he intended to sign, was entitled
it to conform to his original intent, but the cha
not be given retroactive effect. In our case, th
of the instruments dated December 14, 1943
different; it was not merely to restore an intent
supposed to have been conveyed by the instrume
restore the words themselves which were omi
typing error and to confirm the original inte
correction of this type of error should be given
active effect in accordance with Section 1640 of
Code.

Finally, with respect to Appellants' contentio
documents were executed on December 14, 19
than on January 13, 1944 as the Trial Court fou
ing 14), the Government misconstrues the rule
plicable to the evidence.

It is not disputed that the only evidence on
consists of the documents themselves which
WITNESS WHEREOF, the parties hereto do he
their hands this 14th day of December, 1943."
179]. The signatures of the bank officers were
edged on January 13, 1944. This acknowled
not recite that they *executed* the instruments o
13, 1944, but simply that these officers *acknowl*

vernment asserts that in the absence of any nce, we must take the date of execution to be f acknowledgment. This is directly contrary , and furthermore, the Government misreads s of the acknowledgment, for the Government states that the acknowledgment recites that nents were not signed until January 13, 1944. e noted that there was no requirement that the s dated December 14, 1943 be acknowledged in e effective.

is clear that under the state of the evidence ust take the date the instrument bears, Decem-43, as the date on which all the parties executed ent. Section 1963 (23) of the Code of Civil of the State of California provides that it is that a writing is truly dated. Section 1961 de of Civil Procedure provides: "A presumption clared by law to be conclusive) may be contro-other evidence, direct or indirect; but unless so ed the jury are bound to find according to the n." Since there was no evidence whatsoever, ndirect, to controvert the presumption furnished trument itself and its recital that the parties on December 14, 1943, the Court was com-ind in accordance therewith. *Crabbe v. Ma-nnel Gold Min. Co.*, 168 Cal. 500, 506, 143 716 *In re Roberts Estate*, 49 Cal. App. 2d 71, 933.

We note further, that the Government has that this inadvertent omission of the irrevoc vision from the original trust instruments su Court's conclusion as to the lack of intent to fo faith partnership (Resp. Br. pp. 17-18). Ho undisputed that the actual intent of the part include an irrevocability provision and to make irrevocable. The inadvertent omission could way support a finding as a factual matter of intent to form a partnership.

Conclusion.

It is respectfully submitted that the decis Trial Court should be reversed.

Respectfully submitted,

FINK, ROLSTON, LEVINTHA
LEO V. SILVERSTEIN,
SCHWARTZ, GALE & BLOOM

Attorneys for Ap

Act of 1951, approved October 20, 1951
521-Public Law 183):

0. Family Partnerships.

finition of partner.—Section 3797(a)(2) (26
. Sec. 3797(a)(2)) is hereby amended by add-
end thereof the following: 'A person shall
ed as a partner for income tax purposes if he
ital interest in a partnership in which capital
ial income-producing factor, whether or not
st was derived by purchase or gift from any
n.'

location of partnership income.—Supplement F
1 (26 U. S. C. A. Sec. 181 *et seq.*) is hereby
y adding at the end thereof the following new

91. Family partnerships.

case of any partnership interest created by
istributive share of the donee under the part-
reement shall be includible in his gross in-
pt to the extent that such share is determined
owance of reasonable compensation for ser-
red to the partnership by the donor, and ex-
extent that the portion of such share attribu-
ated capital is proportionately greater than the
e donor attributable to the donor's capital. The
share of a partner in the earnings of the part-
ll not be diminished because of absence due to

be considered to be donated capital. The '
any individual shall include only his spouse,
and lineal descendants, and any trust for the pri
fit of such persons.'

"(c) Effective date.—The amendments ma
section shall be applicable with respect to tax
beginning after December 31, 1950. The de
as to whether a person shall be recognized as
for income tax purposes for any taxable year
before January 1, 1951, shall be made as if t
had not been enacted and without references d
the fact that this section is not expressly made
with respect to taxable years beginning befor
1, 1951. In applying this subsection where t
year of any family partner is different from
year of the partnership—

"(1) if a taxable year of the partnership
in 1950 ends within or with, as to all of the f
ners, taxable years which begin in 1951, then
ments made by this section shall be applicable w
to all distributive shares of income derived by
partners from such taxable year of the part
ginning in 1950, and

"(2) if a taxable year of the partnership
1951 ends within or with a taxable year of
partner which began in 1950, then the amendm
by this section shall not be applicable with res
of the distributive shares of income derived by
partners from such taxable year of the partne

nily partnerships

339 of your committee's bill is intended to har-
e rules governing interests in the so-called
nership with those generally applicable to other
roperty or business. Two principles governing
of income have long been accepted as basic:
e from property is attributable to the owner of
ty; (2) income from personal services is at-
o the person rendering the services. There is
for applying different principles to partnership
f an individual makes a bona fide gift of real
of a share of corporate stock, the rent or divi-
ne is taxable to the donee. Your committee's
makes it clear that, however the owner of a
interest may have acquired such interest, the
axable to the owner, if he is the real owner. If
hip is real, it does not matter what motivated
r to him or whether the business benefited from
ce of the new partner.

gh there is no basis under existing statutes for
nt treatment of partnership interests, some de-
his field have ignored the principle that income
rty is to be taxed to the owner of the property.
t decisions since the decision of the Supreme
Commissioner v. Culbertson (337 U. S. 733)
invalid for tax purposes family partnerships
e by virtue of a gift of a partnership interest
nember of a family to another, where the do-
ned no vital services for the partnership. Some
ses apparently proceed upon the theory that a

that a gift of a partnership interest is not comple
the donor contemplates the continued participat
business of the donated capital. However, the
with which the Tax Court, since the Culbertso
has held invalid family partnerships based upon
of capital, would seem to indicate that, althoug
ions often refer to 'intention,' 'business purpose
and 'control,' they have in practical effect reac
which suggest that an intrafamily gift of a p
interest, where the donee performs no substantia
will not usually be the basis of a valid partnersh
purposes. We are informed that the settlemen
cases in the field is being held up by the relia
field offices of the Bureau of Internal Reve
some such theory. Whether or not the opinion
preme Court in Commissioner v. Tower (327 U
and the opinion of the Supreme Court in Comm
Culbertson (337 U. S. 733), which attempted
the Tower decision, afford any justification fo
fusion is not material—the confusion exists.

"The amendment leaves the Commission and
free to inquire in any case whether the don
chaser actually owns the interest in the partner
the transferor purports to have given or sold h
will arise where the gift or sale is a mere sha
cases will arise where the transferor retains
of the incidents of ownership that he will con

rt in an analogous trust situation involved in
Helvering v. Clifford (309 U. S. 351). The
lards apply in determining the bona fides of
nily partnerships as in determining the bona
other transactions between family members.
ns between persons in a close family group,
not involving partnership interest, afford much
for deception and should be subject to close
All the facts and circumstances at the time of
ted gift and during the periods preceding and
it may be taken into consideration in deter-
bona fides or lack of bona fides of a purported
le.

ery restriction upon the complete and unfet-
ol by the donee of the property donated will
ve of sham in the transaction. Contractual re-
nay be of the character incident to the normal
os among partners. Substantial powers may be
the transferor as a managing partner or in
fiduciary capacity which, when considered in
f all the circumstances, will not indicate any
ie ownership in the transferee. In weighing
f a retention of any power upon the bona fides
rted gift or sale, a power exercisable for the
others must be distinguished from a power
he transferor for his own benefit.

be respected for tax purposes without regard t
tives which actuated the transfer, it is cons
propriate at the same time to provide specific sa
whether or not such safeguards may be inher
general rule—against the use of the partnershi
accomplish the deflection of income from the r

"Therefore, the bill provides that in the ca
partnership interest created by gift the allocat
come, according to the terms of the partners
ment, shall be controlling for income-tax pu
cept when the shares are allocated without pro
ance of reasonable compensation for services r
the partnership by the donor, and except to
that the allocation to the donated capital is prop
greater than that attributable to the donor's
such cases a reasonable allowance will be ma
services rendered by the partners, and the bala
income will be allocated according to the amou
tal which the several partners have invested.
the distributive share of a partner in the earni
partnership will not be diminished because of a
to military service.

"When more than one member of a family is
of a partnership, all interests purchased by o
of the family from another will be treated as
transfer were made by gift. For this purpose

Errata in Appellant's Opening Brief.

4: The citation for Thomas v. Feldman should

omas v. Feldman (5th Cir. 1946), 158 F. 2d
Feldman v. Thomas, 34 A. F. T. R. 1631.

5: The first page reference to the transcript
on line 3 should read: R. 137-160 instead of

7: The period in the first sentence of the last
should be changed to a comma so that the
eads:

ank was also consulted and its agreement was
and obtained for the termination of the part-
he distribution of the assets and investment in
ration which succeeded to the business of the
p."

: The word appearing as "severly" on the 13th
d be "severely."

5: The word "revocable" in the next to the
f the first paragraph should be "irrevocable."